(2)

NO. 90-1031

SUPREME COURT OF THE UNITED STATES
October Term, 1990

JACK HALLER,

Petitioner,

v.

DONALD BORROR, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DONALD BORROR

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Argument 5

Conclusion 18

Certificate of Service 20

Appendix

Ohio Rev. Code § 2305.09 (Page 1981) . . . A-1

Ohio Rev. Code § 2305.10 (Page 1989 supp.) A-2

Ohio Rev. Code § 2305.11 (Page 1989 supp.) A-4

TABLE OF AUTHORITIES

CASES

Berghoff v. R.J. Frisby Mfg. Co., 720 F. Supp. 649 (N.D. Ill. 1989) 11

Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) 6, 10

Callwood v. Questel, 883 F.2d 272 (3d Cir. 1989) . 8

Cito v. Bridgewater Township Police Dept., 892 F.2d 23 (3d Cir. 1989) 8, 12

Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990) 16

Cooper v. City of Ashland, 871 F.2d 104 (9th Cir. 1989) 8

Craft v. Rice, 671 S.W.2d 247 (Ky. 1984) 17

Del Percio v. Thomsley, 877 F.2d 785 (9th Cir. 1989) 8

Elzy v. Roberson, 868 F.2d 793 (5th Cir. 1989) . . 9

Farber v. Massillon Board of Education, 917 F.2d 1391 (6th Cir. 1990) 6

Gray v. Lacke, 885 F.2d 339 (7th Cir. 1989), cert. denied, --U.S.--, 110 S. Ct. 1476 (1990) 11, 12

Jones v. Preuit & Mauldin, 876 F.2d 1480 (11th Cir. 1989) 8, 9

Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989) 8, 11

Lundblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989) 6

Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986) 9

Owens v. Okure, --U.S.--, 109 S. Ct. 573 (1989) . . . . . passim

Paladin v. Doyle, 914 F.2d 1494 (6th Cir. 1990) . . 7

Perez v. Seevers, 869 F.2d 425 (9th Cir. 1989) . . . 8

Smith v. Buck, 119 Ohio St. 101 (1928) 15

Thomas v. Shipka, 872 F.2d 772 (6th Cir. 1989) . . 6

Wilson v. Garcia, 471 U.S. 261 (1985) 16, 17

STATUTES

Ohio Rev. Code § 2305.09 (Page 1981) . . 7, 8, 11-18

Ohio Rev. Code § 2305.10 (Page 1989 supp.) passim

Ohio Rev. Code § 2305.11 (Page 1989 supp.) 6

STATEMENT OF THE CASE

Plaintiff-Petitioner Jack Haller filed this action in the United States District Court for the Southern District of Ohio, Eastern Division, on June 21, 1989, more than two years after his February 26, 1987 conviction on extortion charges in the Court of Common Pleas, Franklin County, Ohio.

In his Complaint, Haller alleges that his arrest and conviction for extortion were unlawful; he asserts a panoply of claims arising under federal civil rights statutes (42 U.S.C. §§ 1983 and 1985) and state tort law (malicious prosecution, abuse of process, invasion of privacy, negligence, false imprisonment, and intentional infliction of emotional distress). Haller alleges that each defendant-respondent was associated in some way with the state criminal proceedings against him; Defendant-Respondent Donald Borror was the victim of the extortion, and the remaining defendants-respondents include the Safety Director of the City of Columbus, the Chief of Police, various police officers, a special agent of the Federal Bureau of Investigation, the City of Columbus, the individual prosecutors who obtained

the conviction, and the Franklin County Prosecuting Attorney. Haller claims that the defendants-respondents are members of "the Republican power elite" and that they "conspired . . . to discriminate against anyone who challenged the class of power elite," including Haller. Amended Civil Complaint, par. 87, 90.

In brief, Haller alleges that he became involved in an employment dispute with Borror while serving as an executive of a company owned by a Borror corporation, and that he formally settled his claims against Borror in 1985 in exchange for a settlement payment of $50,000.00. Id. at para. 23. He admits that he then embarked on a campaign of threats and harassment directed against Borror in an attempt to obtain additional sums in excess of the settlement agreement. Id. at par. 21, 33. The Columbus police department began an investigation, at Borror's request, and Haller was arrested on July 9, 1985. Id. at para. 43. According to Haller, Defendant-Respondent Dailey, a Columbus police

captain, attempted to "frame" him for the extortion charge by manufacturing evidence and by murdering a fellow officer who refused to cooperate in the conspiracy. Id. at par. 24-28. Numerous other misdeeds are attributed to the defendants-respondents, ranging from improper supervision of employees to violations of discovery orders during the criminal proceedings against Haller. Haller concedes that he was aware of this alleged misconduct prior to his conviction on the extortion charges, and that these same accusations were the basis of his defense at that trial. Id. at par. 50-54.

The District Court dismissed the instant action on October 18, 1989, concluding that 1) any civil rights claims based on malicious prosecution were premature because the state criminal proceedings had not yet terminated in Haller's favor; 2) the remaining civil rights claims accrued on or before Haller's extortion conviction on February 26, 1987, and were thus barred by the applicable two-year statute of limitations; and 3) pendent jurisdiction

would not be exercised over the state tort claims in the absence of viable federal claims.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment on September 27, 1990, holding that its prior decisions had correctly established that "[t]he two year statute of limitations set forth in Ohio Rev. Code § 2305.10 applies to . . . claims filed under 42 U.S.C. §1983 and §1985." Order, at 2. Haller now seeks review of that ruling by this Court.

ARGUMENT

Petitioner's request for a writ of certiorari should be denied. As set forth below, this litigation does not present any significant issues of law, policy, or fairness. There is no conflict between any lower courts as to the appropriate statutory limitation period for actions arising in Ohio under 42 U.S.C. §§ 1983 or 1985. The decision of the Court of Appeals below does not conflict with applicable decisions of this Court and does not implicate any important question of federal law which should be settled by this Court. Petitioner has utterly failed to present any reason for the Court to accept jurisdiction in this matter.

1. First, contrary to Petitioner's assertions (Petition for a Writ of Certiorari, at 8-9), there is no "uncertainty" as to the appropriate statute of limitations in the Sixth Circuit which has "spawned considerable litigation." Since this Court clarified the standard for determining the applicable state statutory limitation period for federal civil rights

actions in Owens v. Okure, --U.S.--, 109 S. Ct. 573 (1989), the Court of Appeals for the Sixth Circuit has consistently held that actions of this type which arise in Ohio are subject to the two year limitation period of Ohio Rev. Code § 2305.10. See, e.g., Farber v. Massillon Board of Education, 917 F.2d 1391, 1400 (6th Cir. 1990); Lundblad v. Celeste, 874 F.2d 1097, 1103 (6th Cir. 1989); Thomas v. Shipka, 872 F.2d 772, 773 (6th Cir. 1989); Browning v. Pendleton, 869 F.2d 989, 992 (6th Cir. 1989). The Sixth Circuit Court of Appeals has not deviated from this conclusion in a single reported or unreported case; there simply is no "uncertainty."

Petitioner apparently believes that "uncertainty" remains regarding this question because the decision in Browning v. Pendleton, supra, considered only Ohio Rev. Code § 2305.10, a two year statute of limitations, and Ohio Rev. Code § 2305.11, a one year statute of limitations, when it applied the standard announced by this Court in Owens v. Okure, supra (Petition, at 2, n.1); the Browning opinion does

not discuss Ohio Rev. Code § 2305.09(D), the four year catch-all statute of limitations which Petitioner now invokes to revive his stale claims. However, the Browning decision does not address Ohio Rev. Code § 2305.09(D) precisely because it is not applicable to civil rights actions under the legal standard described in the Owens v. Okure decision. (In fact, when this Court listed potentially applicable Ohio intentional and unintentional tort statutes of limitations in Owens v. Okure, supra, --U.S.--, 109 S. Ct. at 578, it similarly failed to even mention this catch-all statute.) In any event, contrary to Petitioner's assertions, the Court of Appeals for the Sixth Circuit later eliminated any "uncertainty" on this question and specifically rejected the use of the four year limitation period of Ohio Rev. Code § 2305.09(D) in federal civil rights litigation arising in Ohio. See, e.g., Paladin v. Doyle, 914 F.2d 1494 (6th Cir. 1990) (No. 90-3242, slip op.; 1990 U.S. App. Lexis 17324). ("[T]he court has considered plaintiffs' argument . . . that Ohio

Rev. Code § 2305.09(D) should be adopted . . . . [T]hat contention is without merit.")

2. Second, the two year limitation period which the Sixth Circuit Court of Appeals has borrowed from Ohio Rev. Code § 2305.10 is not so short as to create injustice or to unfairly prejudice Petitioner in the assertion of his civil rights claims. The majority of the cases now relied upon by Petitioner in seeking review by this Court adopt two year statutory limitation periods in these circumstances. See, e.g., Cito v. Bridgewater Township Police Dept., 892 F.2d 23 (3d Cir. 1989) (New Jersey); Callwood v. Questel, 883 F.2d 272 (3d Cir. 1989) (Virgin Islands); Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989) (Illinois); Cooper v. City of Ashland, 871 F.2d 104 (9th Cir. 1989) (Oregon); Perez v. Seevers, 869 F.2d 425 (9th Cir. 1989) (Nevada). Most of the remaining cases now cited by Petitioner adopt a one year statutory limitation period. See, e.g., Del Percio v. Thomsley, 877 F.2d 785 (9th Cir. 1989) (California); Jones v.

Preuit & Mauldin, 876 F.2d 1480 (11th Cir. 1989) (Alabama); Elzy v. Roberson, 868 F.2d 793 (5th Cir. 1989) (Louisiana). In Jones v. Preuit & Mauldin, supra, 876 F.2d at 1484, the Court of Appeals for the Eleventh Circuit observed:

> Under federal law, a borrowed limitations period should provide a reasonable period of time in which a plaintiff can file suit . . . . No case, however, has held that a one-year limitations period conflicts with the policies behind section 1983 by providing an insufficient period in which to file suit. We decline to so hold in this case.

The use of the Ohio two year statutory limitation period in this case is not oppressive or unfair to Petitioner. Although he argues that he "could not be expected to assume" that this statute would apply to his civil rights claims (Petition, at 8), these claims were subject to the one year limitation period of Ohio Rev. Code § 2305.11 at the time they arose, see Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986), and appeared to be extinguished even before the two year limitation period of Ohio Rev. Code

§ 2305.10 was first applied to Ohio cases in Browning v. Pendleton, supra, following the decision in Owens v. Okure, supra.

3. Third, the ruling of the Court of Appeals below is not in conflict with the decisions of any other state or federal courts regarding the appropriate statute of limitations for civil rights actions arising in Ohio. The "inconsistent" decisions now cited by Petitioner (Petition, at 10) do not address the Ohio statutes of limitations or similar statutes of limitations in other jurisdictions. Only the consistent decisions of the Court of Appeals for the Sixth Circuit, cited above, have applied the standard announced in Owens v. Okure, supra, to a state statutory scheme which includes 1) specific intentional tort statutory limitation periods, 2) a general tort statute of limitations applicable to "bodily injury" and "property damage," and 3) a catch-all statute of limitations which is applicable to "an injury to the rights of the plaintiff" not enumerated elsewhere, but which does not mention personal injuries. See Ohio

Rev. Code § 2305.11, 2305.10, and 2305.09(D). Every case now relied upon by Petitioner addresses a different statutory scheme with differently defined categories of limitation periods; although he claims that Gray v. Lacke, 885 F.2d 339 (7th Cir. 1989), cert. denied, --U.S.--, 110 S. Ct. 1476 (1990), is "particularly contrary" to the ruling below (Petition, at 12), that case involved Wisconsin statutes which do not provide a separate limitation period for bodily injury and property damage claims.

Even if the statutory schemes of other states could be considered in constructing a "conflict" between circuit courts for purposes of the instant Petition, the statutes which are most like the Ohio statutes have been applied in complete harmony with the Sixth Circuit decisions. For example, in Kalimara v. Illinois Dept. of Corrections, 879 F.2d 276 (7th Cir. 1989), the Court borrowed the Illinois two year statutory limitation period which applies only to direct physical injuries to the person, see Berghoff v. R.J. Frisby Mfg. Co., 720 F. Supp. 649, 652 (N.D. Ill.

1989), and refused to adopt the Illinois catch-all statute which, like Ohio Rev. Code § 2305.09(D), "does not mention personal injury actions and is the sort of . . . 'catchall' limitation period rejected in . . . Owens . . . ." 879 F.2d at 277. The decision of the Court of Appeals in the present case is completely consistent with that holding.

Aside from Gray v. Lacke, supra, discussed above, Petitioner does not cite a single decision borrowing a statute of limitations which, like Ohio Rev. Code § 2305.09(D), is limited to "injuries to rights" and does not mention "injuries to the person." Indeed, in Cito v. Bridgewater Twnp. Police Dept., supra, 892 F.2d at 25, the Court expressly rejected the use of such a statute. Ohio Rev. Code § 2305.09(D) is not "almost identical in language" (Petition, at 8) to the example of an appropriate statute offered in Owens v. Okure, supra: "injury to the person or rights of another . . . ." --U.S.--, 109 S. Ct. at 580, n.9 (emphasis added). The Ohio statute does not even mention injuries to the person.

Thus, the decision of the Court below is not in conflict with the decision of any other court, and, to the extent that analogous statutory schemes of other states are relevant, it is consistent with the holdings in other circuits.

4. Fourth, the decision below does not conflict with this Court's decision in Owens v. Okure, supra. As noted above, the language of Ohio Rev. Code § 2305.09(D) differs in fundamental and important ways from the exemplary language used by this Court in that opinion. In fact, the Owens Court did not purport to address limitation statutes like those of Ohio; instead, it held, in connection with distinctly different New York statutes:

> This case raises the question of what limitations period should apply to a § 1983 action where a State has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions. We hold that the residual or general personal injury statute of limitations applies.

--U.S.--, 109 S. Ct. at 574. Obviously, the Ohio statutory scheme does not fall within this description;

as noted above, it has separate statutes for intentional torts, a general statute for bodily injury and property damage resulting from unintentional torts, and a catch-all statute that does not even mention personal injury actions.

In order to invent a conflict with Owens v. Okure in the present case, Petitioner must pretend 1) that Ohio Rev. Code § 2305.10 is limited to intentional torts, when it clearly is not, and 2) that Ohio Rev. Code § 2305.09(D) is "the residual or general personal injury statute of limitations," supra, --U.S.--, 109 S. Ct. at 574, when its language does not even mention injuries to persons.

In an attempt to avoid these logical deficiencies, Petitioner argues that Ohio Rev. Code § 2305.09(D) has been applied to three unique tort causes of action, and that it is therefore a "residual" (although not "general") "personal injury statute of limitations." He cites Ohio state court decisions involving loss of consortium, invasion of privacy, and intentional infliction of emotional distress. (Petition,

at 9-10.) There are two basic flaws in that argument. First, Ohio Rev. Code § 2305.09(D) does not include "injuries to the person" or "personal injuries" in the statutory language describing its scope, and the three cited tort causes of action do not involve "personal injury," which is defined under Ohio law as "an injury either to the physical body of a person or to the reputation of a person, or to both." Smith v. Buck, 119 Ohio St. 101 (1928). Second, Petitioner's argument is in direct contravention of the holding of this Court in Owens v. Okure, supra, --U.S.--, 109 S. Ct. at 580, "reject[ing] the practice of drawing narrow analogies between § 1983 claims and state causes of action" in determining the appropriate statutory limitation period for federal civil rights actions. For example, Petitioner argues that "[t]he torts of intentional infliction of emotional distress and invasion of the right to privacy are analogous to . . . civil rights violations" (Petition, at 10), despite this Court's admonition that "[t]he adoption of one analogy rather than another will often be somewhat

arbitrary . . . . Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." Wilson v. Garcia, 471 U.S. 261, 272 n.24, 272-73 (1985).

Following the command of the Wilson decision, supra, 471 U.S. at 270, that "Congress intended the characterization of § 1983 to be measured by federal rather than state standards," the Court in Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990), rejected the same argument now made by Petitioner. The plaintiff in that case argued that the Kentucky catch-all statute of limitations, which -- like Ohio Rev. Code § 2305.09(D) -- applies to "an action for an injury to the rights of the plaintiff not arising on contract and not otherwise enumerated," should govern civil rights actions because the general Kentucky tort statute of limitations has been limited to physical injury claims by Kentucky state courts and does not apply to

emotional distress claims. See Craft v. Rice, 671 S.W.2d 247 (Ky. 1984). The Collard Court noted that the language "personal injury" does not appear in the catch-all statute and that, pursuant to the language in Wilson v. Garcia, supra, quoted above, Kentucky state court decisions characterizing state tort claims for statutory limitation purposes are not controlling in federal civil rights actions. 896 F.2d at 182-83. Accordingly, it refused to adopt the catch-all statute and applied the physical injury statute to § 1983 claims.

The decision of the Court of Appeals in the present case reached the same result; it does not conflict with Owens v. Okure, supra, or with other decisions of this Court. Ohio Rev. Code § 2305.09(A) is not the "general or residual statute of limitations for personal injury actions," and the Court of Appeals properly refused to borrow its limitation period in this litigation.

CONCLUSION

Petitioner's request for a writ of certiorari should be denied. The instant litigation does not raise any significant issues of law, policy, or fairness. There is no uncertainty as to the appropriate statute of limitations for federal civil rights actions arising in Ohio; the Court of Appeals for the Sixth Circuit has expressly rejected Petitioner's claim that the four year limitation period of Ohio Rev. Code § 2305.09(D) should be applied, and its adoption of the two year limitation period of Ohio Rev. Code § 2305.10 does not conflict with the decisions of any other court on this issue.

The courts of appeals have uniformly held that even a one year statutory limitation period is sufficient for federal civil rights actions. Petitioner cannot claim that he was unfairly surprised by the adoption of the two year period, when a one year statutory limitation period was in force at the time he permitted his causes of action to expire.

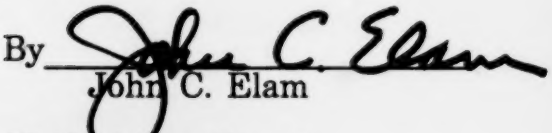
Finally, the decision below is consistent with rulings in other circuits which have addressed similar statutes, and does not conflict in any way with previous decisions of this Court.

Accordingly, the request for a writ of certiorari should be denied.

Respectfully submitted,

VORYS, SATER, SEYMOUR
AND PEASE

John C. Elam

By 
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition for Respondent Donald Borror were served upon all other parties in this action:

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APPENDIX

Ohio Rev. Code § 2305.09 (Page 1981)

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Rev. Code § 2305.10 (Page 1989 supp.)

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Ohio Rev. Code § 2305.11 (Page 1989 supp.)

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B)(1) Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant

is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

* * * *